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HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.283 of 2003

Durgi Bai

- Versus -

The State of Chhattisgarh

JUDGMENT FOR CONSIDERATION

Sd/-
J U D G E
18-9-2007

HON'BLE MR. JUSTICE SUNIL KUMAR SINHA

I agree.

Sd/-
Sunil Kumar Sinha
Judge

POST FOR JUDGMENT ON 19th SEPTEMBER, 2007

Sd/-
L.C. Bhadoo
Judge

(34)

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.283 of 2003

APPELLANT: (In Jail) — Durgi Bai, D/o Late Jhagru Sonkar, Age 22 years, R/o Nandai, P.S. Basantpur, Distt. Rajnandgaon (C.G.)

- Versus -

RESPONDENT: — The State of Chhattisgarh, Through P.S. Basantpur, Rajnandgaon (C.G.)

{Criminal appeal under Section 374 (2) of Code of the Criminal Procedure 1973}

Appearance:

Mr. Anup Majumdar, counsel for the appellant.

Mr. Vinay Harit, Deputy Advocate General for the State/respondent.

Division Bench: Hon'ble Mr. L.C. Bhadoo and Hon'ble Mr. Sunil Kumar Sinha, JJ.

JUDGMENT

(Delivered on 19th September, 2007)

The following judgment of the Court was delivered by **L.C. Bhadoo, J.**: -

1. This appeal is directed against the judgment of conviction and order of sentence dated 11-4-2001 passed by the 2nd Additional Sessions Judge, Rajnandgaon, in Sessions Trial No.22/2001, whereby learned Additional Sessions Judge after holding the accused/appellant guilty for commission of offence under Sections 302 & 318 of the I.P.C., sentenced her to undergo imprisonment for life and pay a fine of Rs.100/-, in default of payment of fine to further undergo simple imprisonment for one month and to undergo simple imprisonment for two years, respectively. Co-accused Shyamvati was also convicted under Sections 318 & 201 of the I.P.C., she was sentenced to undergo simple imprisonment for two years and to undergo simple imprisonment for seven years and pay a fine of Rs.100/-, in default of payment of fine to further undergo simple imprisonment for one month, respectively.

2. Case of the prosecution is that on 10-11-2000 Durgi Bai gave birth to a live child, but in order to escape from defamation, after digging a pit in the house, the body of newly born baby was buried in the pit as a result of which

the baby died. After two days when foul smell started emanating from the body, mother of Durgi Bai exhumed the body from the pit and threw the same in the dust bin in the street which was seen by the persons of the vicinity, therefore, the same was intimated to Police Station: Basantpur over telephone. The said Dehati merg intimation Ex.P-9 was recorded by Shaukat Ali and based on that, merg intimation Ex.P-8 was registered. He left for Village Nandai and prepared site Panchnama Ex.P-2. Site plan Ex.P-7 was prepared by the Patwari. After giving notice Ex.P-13 to the Panchas, inquest Ex.P-14 was prepared on the body of newly born baby. Site plan Ex.P-12 was prepared by the Investigating Officer. Body of the baby was sent for post-mortem examination to District Hospital, Rajnandgaon where Dr. P. Akhtar (PW-5) conducted post-mortem, prepared post-mortem report Ex.P-7 and opined that cause of death (infanticide) is due to suffocation & asphyxia leading to cardio respiratory arrest & death, mode of death may be homicidal in nature. Durgi Bai was sent for medical examination to District Hospital, Rajnandgaon under Ex.P-10A where Dr. Mrs. Shail Khare examined Durgi Bai in respect of her pregnancy and giving birth to a child. She opined that Durgi Bai might have delivered a child within a week. She prepared report Ex.P-10 and based on this report, first information report Ex.P-11 was registered.

3. After completion of investigation, charge sheet was filed in the Court of Chief Judicial Magistrate, Rajnandgaon, who in turn committed the case to the Court of Sessions Judge, Rajnandgaon, from where learned 2nd Additional Sessions Judge, Rajnandgaon received the case on transfer for trial.

4. The prosecution in order to establish charges against the accused persons examined ten witnesses. Statements of the accused persons were recorded under Section 313 of the Cr.P.C. in which they denied the material appearing against them in the prosecution evidence and stated that they are innocent, they have been falsely implicated in the crime.

5. Learned Additional Sessions Judge after hearing counsel for respective parties, convicted and sentenced the accused persons as aforementioned.

6. We have heard learned counsel for the parties.

7. In order to sustain the charges against the accused/appellant, the prosecution was required to establish that Durgi Bai gave birth to a live child, thereafter, she committed the murder of the child and secretly disposed of the body to conceal the birth of the child.

(36)

8. Dihyarin Bai (PW-1) has turned hostile and she has not supported the prosecution case. Similarly, Smt. Hamida Begum (PW-2) has also turned hostile and she has stated in her evidence that she saw that in front of the house of the accused persons body of a newly born baby was lying, Shyamvati picked up the body and threw it in a dust bin. In cross-examination, she has stated that she informed the Police over telephone, she had not seen the dead body of the baby and it is correct that she does not know who threw the body of the baby in the dust bin. Kum. Ganga Shankar (PW-3) has also turned hostile and she has not supported the case of the prosecution. She has stated in her evidence that on the fateful day she was coming from college, she saw that number of persons were standing in the street where her house is situated, on enquiry her sister Gayatri said that body of a child is lying. Fuloobai (PW-4) has also turned hostile and she has also not supported the prosecution case. Mrs. Shail Khare (PW-9) has stated in her evidence that on 15-11-2000 she medically examined Durgi Bai, she was unmarried and on enquiry, Durgi Bai informed her that she had delivered a child five days before. On examination of Durgi Bai, she found that her breasts were developed, on pressing the breasts there was colostrum secretion leakage, on examination of private parts there was perineal tear, lochia was present, smell was emanating, womb was equivalent to 12 weeks and there was an old mark of rupture of hymen. In view of the evidence of Dr. Mrs. Shail Khare (PW-9), it is established that Durgi Bai had delivered a child.

9. Now, the question remains whether the child was born alive. In this connection, Dr. P. Akhtar (PW-5) has stated in his evidence that on 13-11-2000 he conducted post-mortem on the body of newly born baby, the body was of 2-3 days' child, that was putrefied and on account of putrefaction skin was peeled of and in some parts there were maggots. On opening the body it was found that 3rd, 4th, 5th & 6th left side ribs were fractured and similarly, 2nd, 3rd, 5th & 6th right side ribs were also fractured. On cutting of lungs blood mixed with froth came out and after cutting the lungs when it was put in water it was floating, for that reason he opined that the baby was born alive. In his opinion it may homicidal death.

10. Hydrostatic test is not a conclusive proof to establish that the child was born alive. Dr. Mrs. Shail Khare (PW-9) has stated in her evidence that the size of womb was equivalent to 12 weeks pregnancy, whereas, normal delivery period is 36 to 38 weeks. In this case, no evidence has been led to show that

(37)

in how much period, fetus gets life. Even Dr. P. Akhtar (PW-5) has not stated about age of the child but he has stated that the child was fully developed. Moreover, Dr. P. Akhtar (PW-5) has stated that the body of the child was in putrefied condition, even maggots were present. In such a condition where such high degree of putrefaction had taken place, based on the hydrostatic test, in spite of the fact that the body was putrefied, it was not possible to ascertain whether the child was born alive. Therefore, without any cogent circumstantial evidence, merely on the basis of hydrostatic test, which was found positive, it cannot be held that the baby was born alive. In order to reach to a conclusion that the baby was born alive, hydrostatic test must be corroborated by other circumstantial evidence. Whatever evidence adduced by the prosecution there is no cogent and clear evidence as to what was the age of the child. Except the evidence of Dr. Mrs. Shail Khare (PW-9) who examined Durgi Bai and opined that milk was present in the breasts, size of the womb was equivalent to 12 weeks, there is no other evidence that Durgi Bai gave birth to a live child. Dr. Mrs. Shail Khare (PW-9) has stated that womb of Durgi Bai was equivalent to 12 weeks, whereas Dr. P. Akhtar (PW-5) has stated that the child was fully developed and full term for birth of a child is 36 to 38 weeks, thereby the evidence of Dr. Mrs. Khare on the one hand and Dr. Akhtar on the other hand about the age of child is contradictory, because Dr. Mrs. Khare has stated that size of womb was equivalent to 12 weeks. Therefore, it is difficult to say that the child whose post-mortem was conducted by Dr. Akhtar was the same to whom Durgi Bai gave birth.

11. For the foregoing reasons, we are of the considered opinion that the prosecution has not been able to establish by clear, clinching and legal evidence beyond reasonable doubt that Durgi Bai gave birth to a live child and thereafter, in order to screen the birth, body of the child was buried and that was the cause of death of the newly born baby.

12. In the result, conviction and sentence of Durgi Bai under Sections 302 & 318 of the I.P.C. cannot be sustained. The appeal filed by the appellant succeeds. Accordingly, conviction and sentences of the appellant are set aside. She be set at liberty forthwith if not required in any other case. As per the record, she is in detention since 15-11-2000.

Sd/-
L.C. Bhadoo
Judge

Sd/-
Sunil Kumar Sinha
Judge

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